

Statutory Firearms Restrictions in Domestic Violence Cases

In This Chapter...

| | | |
|------|---|-----|
| 9.1 | Chapter Overview | 395 |
| 9.2 | Definitions | 397 |
| 9.3 | Effect of Federal Firearms Provisions on State Law | 397 |
| 9.4 | Michigan Restrictions That Apply Upon Indictment on Felony or Misdemeanor Charges | 398 |
| 9.5 | Restrictions Arising from Conviction of a Felony | 402 |
| 9.6 | Restrictions Upon Conviction of a Misdemeanor | 408 |
| 9.7 | Restrictions Arising from Entry of a Court Order | 416 |
| 9.8 | Court Orders Prohibiting Law Enforcement Officers from Purchasing or Possessing Firearms | 421 |
| 9.9 | Michigan Restrictions on Concealed Weapons Applicable to Dangerous Individuals | 422 |
| 9.10 | Seizure and Forfeiture of Firearms Under Michigan Law | 423 |
| 9.11 | Chart: Summary of Federal and Michigan Statutory Firearms Restrictions | 424 |

9.1 Chapter Overview

Under Const 1963, art 1, §6, “[e]very person has a right to keep and bear arms for the defense of himself and the state.” However, the state may impose valid restrictions on the right to purchase or possess a firearm. See *People v Smelter*, 175 Mich App 153, 155 (1989) (“The right to regulate weapons extends not only to the establishment of conditions under which weapons may be possessed, but allows the state to prohibit weapons whose customary employment by individuals is to violate the law.”) and *Kampf v Kampf*, 237 Mich App 377, 383 (1999) (“[T]he Michigan Constitution does not protect the right to bear arms in the context of sport or recreation.”).

Note: The Second Amendment to the U.S. Constitution does not apply to the states. *People v Swint*, 225 Mich App 353, 359-360 (1997), citing *Miller v Texas*, 153 US 535, 538 (1894). Moreover, federal cases interpreting the Second Amendment offer little guidance in construing Const 1963, art 1, §6, because of the textual differences between the Second Amendment and the corresponding Michigan provision. (The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”) On the authority of the U.S. Congress to regulate firearms, see *United States v Napier*, 233 F3d 394, 403 (CA 6, 2000) and *United States v Warin*, 530 F2d 103, 107 (CA 6, 1976), holding that the Second Amendment creates no individual

*This chapter focuses on the circumstances that are likely to arise in cases involving domestic violence. Firearms disabilities may also arise from other circumstances beyond the scope of this discussion, such as mental illness, controlled substance addiction, or dishonorable discharge from the armed services.

right, and that legislative restrictions on the use of firearms do not impinge on any constitutionally protected liberties.

This chapter addresses federal and state statutory firearms restrictions that apply to individuals who are subject to the following criminal proceedings or court orders:

- ♦ Indictment on felony or misdemeanor charges.
- ♦ Conviction of a felony.
- ♦ Conviction of a misdemeanor.
- ♦ Pretrial conditional release orders and probation orders issued in criminal cases for the protection of a named person.
- ♦ Personal protection orders.*

Additionally, this chapter addresses Michigan firearms restrictions that apply to individuals who are otherwise deemed dangerous to themselves or others.

Under federal and Michigan statutes, individuals subject to the foregoing proceedings or orders may face four types of restrictions on access to firearms:

- ♦ **Prohibition from purchasing or possessing any firearms.** Federal law prohibitions arise upon conviction of any felony or a misdemeanor domestic violence crime, and upon entry of certain orders for conditional pretrial release, probation, or personal protection. State law prohibitions arise upon conviction of certain felonies.
- ♦ **Prohibition from obtaining a license to purchase, carry, or transport a pistol (hereinafter a “pistol license”).** This prohibition arises under state law only. It applies to individuals who are subject to: a felony indictment; a felony conviction; a pretrial conditional release order issued for the protection of a named person; or a personal protection order. It may also apply to persons deemed a threat to themselves or others.
- ♦ **Prohibition from obtaining a license to carry a concealed pistol (hereinafter a “concealed pistol license”).** This prohibition arises under state law only. It applies to individuals who are subject to: a felony indictment; a felony or misdemeanor conviction; a pretrial conditional release order issued for the protection of a named person; or a personal protection order. It may also apply to persons deemed dangerous to themselves or others.
- ♦ **Suspension or revocation of an existing concealed pistol license.** A concealed pistol license may be suspended under state law if its holder is charged with a felony or misdemeanor. A concealed pistol license may be revoked if its holder becomes ineligible to obtain a license.

The rest of this chapter will describe the foregoing restrictions in more detail. The reader will also find a brief review of Michigan statutory provisions governing the seizure and forfeiture of firearms used in violation of the law.

9.2 Definitions

For purposes of this chapter, the federal and state definitions of “firearms” should be noted. For purposes of the federal provisions discussed in this chapter, a “firearm” is:

“(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.* Such term does not include an antique firearm.” 18 USC 921(a)(3).

*The term “destructive device” includes such things as bombs, grenades, or mines. See 18 USC 921(a)(4).

The Michigan statutes define a “firearm” as:

“a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB’s not exceeding .177 caliber.” MCL 28.421(b) and MCL 750.222(d).

The Michigan statutes also define a “pistol” as:

“a loaded or unloaded firearm that is 30 inches or less in length, or a loaded or unloaded firearm that by its construction and appearance conceals it as a firearm.” MCL 28.421(e). See also MCL 750.222(e).

9.3 Effect of Federal Firearms Provisions on State Law

The federal firearms statutes do not preempt Michigan law governing firearms to the extent that Michigan law is consistent with the federal statutes. 18 USC 927 provides:

“No provision of [18 USC 921 et seq., governing firearms restrictions] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.”

For a case construing this statute, see *United States v Friday*, 404 F Supp 1343, 1345 (ED Mich, 1975) (“If the congressional scheme conflicts with certain provisions of a state system, Congress has deemed the conflicting state provision pro tanto inadequate by providing that the federal law controls.”) For a general discussion of the federal preemption doctrine, see *People v Hegedus*, 432 Mich 598 (1989).

9.4 Michigan Restrictions That Apply Upon Indictment on Felony or Misdemeanor Charges

A. Restrictions Applicable to License Applicants Upon Felony Indictment

An indictment on felony charges gives rise to two firearms restrictions under Michigan law:

- ♦ The person under indictment may not obtain a license to purchase, carry, or transport a pistol (a “pistol license”). MCL 28.422(3)(d).
- ♦ The person under indictment may not obtain a license to carry a concealed pistol (a “concealed pistol license”). MCL 28.425b(7)(f).

B. Restrictions Applicable to Concealed Pistol License Holders Upon Felony or Misdemeanor Indictment

1. Notice to Concealed Weapon Licensing Board

MCL 28.425m requires the prosecuting attorney to promptly notify the issuing county concealed weapon licensing board of a criminal charge against a license holder “for a felony or specified criminal offense as defined in this act.” The prosecuting attorney must also promptly notify the issuing board of the disposition of the criminal charge. If the license holder was convicted of a crime, this notice must indicate if the crime involved “the brandishing or use of a pistol, if the pistol was carried by the license holder during the commission of the crime, or if no pistol was carried by the license holder during the commission of the crime.” *Id.*

The applicable definitions provided in MCL 28.421 do not include the term “specified criminal offense” as used in MCL 28.425m. See Section 9.6(B) for the definition of “misdemeanor.” Any misdemeanor conviction in Michigan or elsewhere will disqualify an applicant from obtaining a concealed pistol license if it occurred in the three years immediately preceding the date of application. MCL 28.425b(7)(i). Additionally, certain misdemeanors listed in MCL 28.425b(7)(h) will disqualify an applicant from obtaining a concealed pistol license if the conviction occurred in the eight years immediately preceding the date of application. For more information about these provisions, see Section 9.6(B).

2. Suspension of License

MCL 28.428(3) provides for the immediate suspension of a concealed pistol license held by a person charged with a felony or misdemeanor crime, as follows:

“If the concealed weapon licensing board is notified by a law enforcement agency or prosecuting official that an individual

licensed to carry a concealed pistol is charged with a felony or misdemeanor as defined in this act, the concealed weapon licensing board shall immediately suspend the individual's license until there is a final disposition of the charge for that offense and send notice of that suspension to the individual's last known address as indicated in the records of the concealed weapon licensing board. The notice shall inform the individual that he or she is entitled to a prompt hearing on the suspension, and the concealed weapon licensing board shall conduct a prompt hearing if requested in writing by the individual."

It is not clear whether criminal contempt charges for a PPO violation are encompassed by this provision. See Section 9.6(B) for the definition of "misdemeanor" under MCL 28.428(3), and Section 8.9(A) for a general discussion of whether criminal contempt constitutes a "misdemeanor."

The concealed weapon licensing board may revoke a license if it determines that an individual is ineligible to receive a license. MCL 28.428(1). The statute further provides for LEIN entry of an order suspending or revoking a license, as follows:

"If the concealed weapon licensing board orders a license suspended or revoked under this section or amends a suspension or revocation order, the concealed weapon licensing board shall immediately notify a law enforcement agency having jurisdiction in the county in which the concealed weapon licensing board is located to enter the order or amended order into the law enforcement information network. A law enforcement agency that receives notice of an order or amended order under this subsection from a concealed weapon licensing board shall immediately enter the order or amended order into the law enforcement information network as requested by that concealed weapon licensing board." MCL 28.428(5).

C. Exemptions from Licensing Restrictions

The foregoing licensing restrictions do not apply to certain government employees acting in the course of their employment:*

- ♦ Pursuant to MCL 28.432, the pistol licensing statute does not apply to any of the following:
 - “(a) A police or correctional agency of the United States or of this state or any subdivision of this state.
 - “(b) The United States army, air force, navy, or marine corps.
 - “(c) An organization authorized by law to purchase or receive weapons from the United States or from this state.

*The person indicted may be subject to other restrictions imposed by his or her employer, however.

“(d) The national guard, armed forces reserves, or other duly authorized military organization.

“(e) A member of an entity or organization described in subdivisions (a) to (d) for a pistol while engaged in the course of his or her duties with that entity or while going to or returning from those duties.

“(f) A United States citizen holding a license to carry a pistol concealed upon his or her person issued by another state.

“(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms or a licensed dealer.”

- ◆ Pursuant to MCL 28.432a, the requirements for obtaining a license to carry a concealed pistol do not apply to any of the following:

“(a) A peace officer of a duly authorized police agency of the United States or of this state or a political subdivision of this state, who is regularly employed and paid by the United States or this state or a subdivision of this state, except a township constable.

“(b) A constable* who is trained and certified under the commission on law enforcement standards act, . . . MCL 28.601 to 28.616, while engaged in his or her official duties or going to or coming from his or her official duties, and who is regularly employed and paid by a political subdivision of this state.

“(c) A person regularly employed by the department of corrections and authorized in writing by the director of the department of corrections to carry a concealed pistol during the performance of his or her duties or while going to or returning from his or her duties.

“(d) A member of the United States army, air force, navy, or marine corps while carrying a concealed pistol in the line of duty.

“(e) A member of the national guard, armed forces reserves, or other duly authorized military organization while on duty or drill or while going to or returning from his or her place of assembly or practice or while carrying a concealed pistol for purposes of that military organization.

“(f) A resident of another state who is licensed by that state to carry a concealed pistol.

*The concealed pistol statute is applicable to township constables.

“(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms.

“(h) A person while carrying a pistol unloaded in a wrapper or container in the trunk of his or her vehicle or, if the vehicle does not have a trunk, from transporting that pistol unloaded in a locked compartment or container that is separated from the ammunition for that pistol from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business, or in moving goods from 1 place of abode or business to another place of abode or business.

“(i) A peace officer or law enforcement officer from Canada.”

D. Criminal Liability for Violation of Licensing Restrictions

An order suspending or revoking a concealed pistol license (or an amended order) is immediately effective. However, an individual is not criminally liable for violating the order or amended order unless he or she has received notice of it. MCL 28.428(6). If an individual is carrying a pistol in violation of a suspension or revocation order, but has not previously received notice of it, the individual shall be informed of the order and be given an opportunity to properly store the pistol or otherwise comply with the order before an arrest is made for a violation. MCL 28.428(7). A law enforcement officer who notifies an individual of a suspension or revocation order in this situation shall enter a statement into the LEIN network that the individual has received notice of the order. MCL 28.428(8).

Obtaining a pistol in violation of the pistol licensing statute is a misdemeanor punishable by 90 days in jail and/or a maximum \$100.00 fine. MCL 750.232a(1). Carrying a concealed pistol without a license is a felony punishable by a maximum five years' imprisonment and/or a maximum \$2,500.00 fine. MCL 750.227(3). See also MCL 750.223(3)(a), which makes it a felony to sell a firearm or ammunition to a person under indictment for a felony punishable by imprisonment for four years or more.

Federal criminal penalties are also imposed on those who sell firearms or ammunition to persons under indictment for crimes punishable by more than one year's imprisonment. See 18 USC 922(d)(1) and 18 USC 924(a)(2) (imposing a fine and/or a maximum ten-year prison term for violations). Crimes punishable by more than a year's imprisonment do not include antitrust or similar offenses related to the regulation of business practices, or state two-year misdemeanors. 18 USC 921(a)(20).

9.5 Restrictions Arising from Conviction of a Felony

Both federal and Michigan law restrict the purchase or possession of firearms by individuals convicted of felony offenses. Additionally, licensing restrictions arise under Michigan law.

A. Federal Restrictions on the Purchase or Possession of Firearms or Ammunition by Convicted Felons

Persons convicted of a crime punishable by imprisonment for a term exceeding one year may not purchase or possess firearms or ammunition under the federal firearm statutes. 18 USC 922(g)(1) provides:

“(g) It shall be unlawful for any person —

“(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .

“to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

18 USC 921(a)(20) contains the definitions for the terms used in the above provision. It provides that a “crime punishable by imprisonment for a term exceeding one year” does not include a state offense classified by the laws of the state as a misdemeanor and punishable by a term of imprisonment of two years or less. The statute also excludes antitrust or similar offenses related to the regulation of business practices.

What constitutes a “conviction” for purposes of 18 USC 922(g)(1) is to be determined in accordance with the law of the jurisdiction where the conviction was entered. Additionally, “[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” 18 USC 921(a)(20). Any restoration of civil rights after a conviction must take place according to the law of the jurisdiction where the conviction was entered. *Beecham v United States*, 511 US 368, 371 (1994).

Note: In Michigan, convictions are set aside under MCL 780.621. For purposes of the federal prohibition on firearms possession, a convicted felon’s civil rights are restored in Michigan upon completion of sentence. *Hampton v United States*, 191 F3d 695 (CA 6, 1999) (petitioner charged with violating 18 USC 922(g)(1) had no felony “conviction” as defined in 18 USC 921(a)(20) because his civil rights were restored upon completion of his sentence for the predicate offense). However, a convicted felon’s

right to purchase or possess firearms is also restricted by MCL 750.224f, which is discussed at Section 9.5(B). In *Hampton v United States*, *supra*, this statute did not restrict the convicted felon's ability to possess a firearm because its restriction period had expired. However, in *United States v Williams*, 134 F Supp 2d 851 (ED Mich, 2001), a convicted felon who failed to comply with the restrictions imposed by MCL 750.224f was subject to the federal prosecution for firearms possession, even though he had completed his sentence and his civil rights were otherwise restored under Michigan law. See Section 9.5(C) for more information on what constitutes a "conviction" under Michigan law.

The penalty for violating 18 USC 922(g)(1) is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).

Exemptions from the foregoing restrictions are available for government personnel under 18 USC 925(a)(1):

"The provisions of this chapter . . . shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof."

Relief from disabilities imposed under 18 USC 922(g)(1) is available upon application to the U.S. Attorney General. The U.S. Attorney General may grant relief "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 USC 925(c).

In addition to the foregoing restrictions, federal law forbids the sale of firearms or ammunition to a person who has been convicted of a crime punishable by more than one year in prison.* See 18 USC 922(d)(1) and 18 USC 924(a)(2) (imposing a fine and/or a maximum ten-year prison term for violations).

B. Michigan Restrictions on the Purchase or Possession of Firearms by Convicted Felons

If a felony conviction was for an offense punishable by imprisonment for four years or more, the person convicted may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute firearms in Michigan until certain conditions are fulfilled. MCL 750.224f(1) and (5). Violation of this statute is a felony punishable by a maximum five years' imprisonment and/or a maximum \$5,000.00 fine. MCL 750.224f(3).

*Crimes punishable by more than one year in prison do not include antitrust or similar offenses related to the regulation of business practices, or state two-year misdemeanors. 18 USC 921(a)(20).

MCL 750.224f(1)–(2) provides for expiration of the foregoing restrictions at a given time after all of the following conditions are met:

- ♦ Payment of all fines resulting from the violation;
- ♦ Completion of all imprisonment imposed for the violation; and
- ♦ Successful completion of all conditions of probation or parole imposed for the violation.

For all but certain “specified felonies” covered by the statute, the firearms prohibition expires three years after the foregoing conditions are met. MCL 750.224f(1). For “specified felonies,” however, the prohibition expires five years after these conditions are met. MCL 750.224f(2). Additionally, a person convicted of a “specified felony” must make application to the concealed weapon licensing board under MCL 28.424. “Specified felonies” are felonies in which one or more of the following circumstances exist:

“(i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

“(ii) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.

“(iii) An element of that felony is the unlawful possession or distribution of a firearm.

“(iv) An element of that felony is the unlawful use of an explosive.

“(v) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson.” MCL 750.224f(6).

Government employees (e.g., law enforcement officers) are *not* exempt from the restrictions imposed on convicted felons under MCL 750.224f. See MCL 750.231.

A person selling a firearm or ammunition to anyone who may not purchase or possess a firearm under MCL 750.224f is subject to felony sanctions of ten years’ imprisonment and/or a \$5,000.00 fine. MCL 750.223(3)–(4).

The Michigan Court of Appeals has rejected an *ex post facto* challenge to MCL 750.224f, which makes it a crime for a convicted felon to possess a firearm. See *People v Tice*, 220 Mich App 47 (1996).

Note: MCL 750.224f does not apply to “a conviction that has been expunged or set aside, or for which the person has been pardoned, unless the expunction, order, or pardon expressly provides that the person shall not possess a firearm.” MCL 750.224f(4). Michigan convictions may be set aside under MCL 780.621.*

*For discussion of this statute, see Miller, *Crime Victim Rights Manual* (MJJ, 2001), Section 3.2.

C. Michigan Licensing Restrictions for Convicted Felons

Conviction of a felony in Michigan or elsewhere disqualifies an individual from obtaining a license to carry a concealed pistol. MCL 28.425b(7)(f). Additionally, felons subject to the restrictions on purchasing or possessing a firearm imposed by MCL 750.224f* may not obtain a license to purchase, carry, or transport a pistol, MCL 28.422(3)(e). Felons subject to MCL 750.224f are additionally prohibited from obtaining a concealed pistol license under MCL 28.425b(7)(e).

*MCL 750.224f is discussed in Section 9.5(B).

MCL 28.425b(17)(a) defines “conviction” as “a final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the juvenile division of probate court or family division of circuit court for a violation that if committed by an adult would be a crime.”

MCL 333.7411 provides that when a person who has not previously been convicted of a controlled substance offense, or who has one prior conviction for possession of an imitation controlled substance, pleads guilty to or is convicted of an enumerated controlled substance offense, the trial court may defer further proceedings and place that individual on probation.* If the individual fulfills the terms of probation, the court must discharge the individual and dismiss the proceedings. In *Carr v Midland County Concealed Weapons Licensing Board*, 259 Mich App 428, 438 (2003), the Court held that once an individual has been successfully discharged from a felony drug charge pursuant to MCL 333.7411, that individual has not been convicted of a felony for the purposes of the Concealed Pistol Licensing Act.

*For more information on MCL 333.7411, see *Managing A Trial Under the Controlled Substances Act* (MJJ, 1995), Section 15.7.

MCL 780.621 provides the court with the ability to set aside a conviction for certain criminal offenses, provided the individual meets the requirements contained in the statute. In OAG, 2003, No 7133 (May 2, 2003), the Attorney General stated:

*MCL 28.425b was amended by 2002 PA 719, which redesignated MCL 28.425b(7)(o) as 28.425b(7)(n). See Section 9.9 for more information on MCL 28.425(b)(7)(n).

“[A] person convicted of a felony whose conviction has been set aside by order of a Michigan court in accordance with [MCL 780.621], if otherwise qualified, may not be denied a concealed pistol license under [MCL 28.425b(7)(f)]. A person convicted of one of the offenses described under [MCL 28.425b(8)], whose conviction has been set aside, may nevertheless be denied a concealed pistol license on the basis of information concerning that conviction if the concealed weapon licensing board determines that denial is warranted under [MCL 28.425b(7)(o)]*(which provides an exception to granting the license if it would be detrimental to the individual or public)].

MCL 28.425b(17)(b) defines “felony” with reference to MCL 761.1, or as “a violation of a law of the United States or another state that is designated as a felony or that is punishable by death or by imprisonment for more than 1 year.” MCL 761.1 defines a “felony” as “a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.”

The foregoing restrictions do not apply to certain government employees acting in the course of their employment.*

*The employee may be subject to other restrictions imposed by his or her employer, however.

- ♦ Pursuant to MCL 28.432, the pistol licensing statute does not apply to any of the following:

“(a) A police or correctional agency of the United States or of this state or any subdivision of this state.

“(b) The United States army, air force, navy, or marine corps.

“(c) An organization authorized by law to purchase or receive weapons from the United States or from this state.

“(d) The national guard, armed forces reserves, or other duly authorized military organization.

“(e) A member of an entity or organization described in subdivisions (a) to (d) for a pistol while engaged in the course of his or her duties with that entity or while going to or returning from those duties.

“(f) A United States citizen holding a license to carry a pistol concealed upon his or her person issued by another state.

“(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms or a licensed dealer.”

- ♦ Pursuant to MCL 28.432a, the requirements for obtaining a license to carry a concealed pistol do not apply to any of the following:

“(a) A peace officer of a duly authorized police agency of the United States or of this state or a political subdivision of this state, who is regularly employed and paid by the United States or this state or a subdivision of this state, except a township constable.

“(b) A constable* who is trained and certified under . . . MCL 28.601 to 28.616, while engaged in his or her official duties or going to or coming from his or her official duties, and who is regularly employed and paid by a political subdivision of this state.

*The concealed pistol statute is applicable to township constables.

“(c) A person regularly employed by the department of corrections and authorized in writing by the director of the department of corrections to carry a concealed pistol during the performance of his or her duties or while going to or returning from his or her duties.

“(d) A member of the United States army, air force, navy, or marine corps while carrying a concealed pistol in the line of duty.

“(e) A member of the national guard, armed forces reserves, or other duly authorized military organization while on duty or drill or while going to or returning from his or her place of assembly or practice or while carrying a concealed pistol for purposes of that military organization.

“(f) A resident of another state who is licensed by that state to carry a concealed pistol.

“(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms.

“(h) A person while carrying a pistol unloaded in a wrapper or container in the trunk of his or her vehicle or, if the vehicle does not have a trunk, from transporting that pistol unloaded in a locked compartment or container that is separated from the ammunition for that pistol from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business, or in moving goods from 1 place of abode or business to another place of abode or business.

“(i) A peace officer or law enforcement officer from Canada.”

Obtaining a pistol in violation of the pistol licensing statute is a misdemeanor punishable by 90 days in jail and/or a maximum \$100.00 fine. MCL 750.232a(1). Carrying a concealed pistol without a license is a felony

punishable by a maximum five years' imprisonment and/or a maximum \$2,500.00 fine. MCL 750.227(3).

See Section 9.4 regarding license suspension and revocation for concealed pistol license holders who are charged with a felony.

Upon entry of a conviction of a felony resulting in a prohibition against using, transporting, selling, purchasing, carrying, shipping, receiving or distributing a firearm under MCL 28.425b, the Department of State Police shall immediately enter the conviction into the LEIN. MCL 28.425b(8).

9.6 Restrictions Upon Conviction of a Misdemeanor

A. Federal Restrictions for Domestic Violence Misdemeanors

Effective September 30, 1996, the federal Omnibus Consolidated Appropriations Act of 1997 imposes firearms restrictions on anyone who has been convicted of a misdemeanor domestic violence crime. 18 USC 922(g)(9) prohibits such persons from purchasing or possessing a firearm, as follows:

“(g) It shall be unlawful for any person--

. . .

“(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

“to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

The penalty for violating this statute is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).

The foregoing restrictions result from all domestic violence misdemeanor convictions, even those that occurred prior to the September 30, 1996 effective date of the federal statute. The restrictions apply to both handguns and long guns. **There are no exemptions from these restrictions for government (e.g., law enforcement) personnel.** See 18 USC 925(a)(1).*

18 USC 921(a)(33) defines a “misdemeanor crime of domestic violence” as follows:

“(A) . . . [T]he term ‘misdemeanor crime of domestic violence’ means an offense that —

“(i) is a misdemeanor under Federal or State law; and

“(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

“(B)

(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USC 921 et seq.] unless —

“(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

“(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

“(aa) the case was tried by a jury, or

“(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

“(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.”

*A federal appeals court has rejected constitutional challenges to the exemptions in 18 USC 925 based on the equal protection provisions of the Fifth Amendment. *Fraternal Order of Police v United States*, 335 US App DC 359; 173 F3d 898 (1999).

For purposes of 18 USC 921(a)(33)(B)(ii), restoration of civil rights after a conviction must take place according to the law of the jurisdiction where the conviction was entered. See *Beecham v United States*, 511 US 368, 371 (1994).

Applying Michigan principles governing the restoration of civil rights, the U.S. District Court for the Western District of Michigan has held that “Michigan law excludes persons who commit misdemeanor crimes of domestic violence from prosecution under [18 USC 922(g)(9)].” *United States v Wegrzyn*, 106 F Supp 2d 959, 960 (WD Mich, 2000). The district court reasoned that a misdemeanant convicted of domestic violence loses the right to vote upon conviction, pursuant to MCL 168.758b. This statute takes away a misdemeanant’s right to vote “while confined”; however, upon release from custody, this civil right is automatically restored. Thus, upon release from custody, a Michigan domestic violence misdemeanant has “had civil rights restored” as provided in 18 USC 921(a)(33)(B)(ii), and cannot be considered to be “convicted” for purposes of prosecution under 18 USC 922(g)(9). 106 F Supp 2d at 961-962, citing *Hampton v United States*, 191 F3d 695, 702-703 (CA 6, 1999). The court in *Wegrzyn* extended this reasoning to a domestic violence misdemeanant who had not been sentenced to time in jail, holding that “under such circumstances the requirement . . . that civil rights be lost and restored is satisfied.” 106 F Supp 2d at 964. This decision in *Wegrzyn*, *supra* was appealed to the United States Court of Appeals for the Sixth Circuit. In *United States v Wegrzyn*, 305 F3d 593 (CA 6, 2002), the Court of Appeals affirmed the district court’s decision, indicating the decision was “far from ‘absurd’ because, besides being mandated by applicable law, it also gives effect to the Congressional intent to allow states to have input in the definition of the parameters of the crime, and gives effect to the expressed intent of the Michigan legislature.” *Id.* at 600.

Michigan convictions may be set aside under MCL 780.621.*

18 USC 922(g)(9) has withstood constitutional challenge on various grounds, as the following cases illustrate:

- ♦ *United States v Lewis*, 236 F3d 948 (CA 8, 2001) (Rejecting challenges based on the Commerce Clause, the equal protection provisions of the Fifth Amendment, and the Second and Eighth Amendments).
- ♦ *United States v Beavers*, 206 F3d 706 (CA 6, 2000), cert den 529 US 1121 (2000) (The statute does not violate Fifth Amendment due process rights by failing to require the government to prove as an element of the offense the defendant’s knowledge that possession of firearms was illegal).
- ♦ *Fraternal Order of Police v United States*, 335 US App DC 359; 173 F3d 898 (1999) (Rejecting challenges based on the Commerce Clause, and the Second and Tenth Amendments).
- ♦ *United States v Meade*, 175 F3d 215 (CA 1, 1999) (Rejecting challenges based on the Tenth Amendment and the Due Process Clause).

*For discussion of this statute, see Miller, *Crime Victim Rights Manual* (MJI, 2001), Section 3.2.

- ♦ *United States v Smith*, 171 F3d 617 (CA 8, 1999) (Rejecting assertions that the statute was unconstitutionally vague, and that it violated the Second Amendment and the equal protection provisions of the Fifth Amendment).
- ♦ *United States v Thomson*, 134 F Supp 2d 1227 (D Utah, 2001) (Rejecting challenges based on the Ex Post Facto Clause and vagueness).
- ♦ *National Ass'n of Government Employees v Barrett*, 968 F Supp 1564 (ND Ga, 1997) (Rejecting assertions that the statute violated the federal Commerce Clause, the Equal Protection Clause, the Due Process Clause, the Ex Post Facto Clause, the Bill of Attainder Clause, and the Tenth Amendment).

Several federal courts have held that the predicate “domestic violence misdemeanor” giving rise to the prohibitions of 18 USC 922(g)(9) need not have as an element the existence of a domestic relationship between the perpetrator and victim. *United States v Smith*, *supra*, 171 F3d at 620; *United States v Meade*, *supra*, 175 F3d at 219; *United States v Thomson*, *supra*, 134 F Supp 2d at 1230.

Relief from the restrictions imposed under 18 USC 922(g)(9) is available upon application to the U.S. Attorney General. The U.S. Attorney General may grant relief “if it is established to his satisfaction that the circumstances regarding the disability, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.” 18 USC 925(c).

In addition to the foregoing restrictions, federal law forbids the sale or other disposal of firearms or ammunition to a person with knowledge or reasonable cause to believe that the person has been convicted of a domestic violence misdemeanor crime. See 18 USC 922(d)(9) and 18 USC 924(a)(2)(imposing a fine and/or a maximum ten-year prison term for violation of this prohibition).

B. Michigan Restrictions Following a Misdemeanor Conviction

MCL 28.425b(7)(i) disqualifies applicants who have been convicted of an enumerated misdemeanor in Michigan or elsewhere in the three years immediately preceding the date of application. MCL 28.425b(7)(i) disqualifies applicants who have been “convicted of a misdemeanor violation of any of the following in the 3 years immediately preceding the date of application”:

- ♦ Operating under the influence, MCL 257.625.
- ♦ Refusal of commercial vehicle driver to submit to chemical test, MCL 257.625a.
- ♦ Negligently fail to comply (ignition interlock device), MCL 257.625k.

- ♦ Circumventing an ignition interlocking device, MCL 257.625l.
- ♦ Operating a commercial vehicle with an alcohol content, MCL 257.625(3).
- ♦ Operating aircraft under the influence, MCL 259.185.
- ♦ Operating an ORV under the influence, MCL 324.81134.
- ♦ Operating an ORV having consumed controlled substance, MCL 324.81135.
- ♦ Operating a snowmobile under the influence, MCL 324.82127.
- ♦ Controlled substance violations pursuant to MCL 333.7401 to 333.7461.
- ♦ Operating a locomotive under the influence, MCL 462.353(3).
- ♦ Disorderly person, MCL 750.167.
- ♦ Embezzlement, MCL 750.174.
- ♦ False pretenses, MCL 750.218.
- ♦ Larceny, MCL 750.356.
- ♦ Retail fraud, MCL 750.356d.
- ♦ Larceny of a vacant building, MCL 750.359.
- ♦ Larceny by conversion, MCL 750.362.
- ♦ Defrauding a lessor, MCL 750.362a.
- ♦ Malicious destruction of property, MCL 750.377a.
- ♦ Malicious destruction of real property, MCL 750.380.
- ♦ Failure to obey police direction, MCL 750.479a.
- ♦ Receiving stolen property, MCL 750.535.
- ♦ Malicious use of telephones, MCL 750.540e.
- ♦ A violation of a law of the United States, another state, or a local unit of government of this state or another state substantially corresponding to a violation described above.

An applicant is also ineligible to obtain a concealed pistol license if he or she has been convicted of certain specified misdemeanors in the eight years immediately preceding the date of application. These misdemeanors include domestic assault, aggravated domestic assault, stalking, and various firearms offenses; they are listed in MCL 28.425b(7)(h) as follows:

- ♦ Failing to stop when involved in a personal injury accident, MCL 657.617a.
- ♦ Drunk driving, second offense, MCL 257.625(8)(b).
- ♦ Drunk driving, commercial vehicle, MCL 257.625m.
- ♦ Reckless driving, MCL 257.626.
- ♦ Driving while license suspended or revoked, second or subsequent offense, MCL 257.904.
- ♦ Operating aircraft with alcohol with prior conviction, MCL 259.185.

- ♦ Hindering or obstructing weights and measures enforcement officer, MCL 290.629.
- ♦ Hindering, obstructing, assaulting, or committing bodily injury upon director or authorized representative under the motor fuels quality act, MCL 290.650.
- ♦ Operating an ORV under the influence, second or subsequent offense, MCL 324.81134(5) or (6).
- ♦ Operating a snowmobile under the influence with a prior conviction, MCL 324.82128(1)(b) or (c).
- ♦ Operating a vessel under the influence, second or subsequent offense, MCL 324.80177(1)(b).
- ♦ Knowingly or intentionally possessing a controlled substance, MCL 333.7403.
- ♦ Operating a locomotive while under the influence, MCL 462.353(4).
- ♦ Displaying sexually explicit materials to minors, MCL 722.677.
- ♦ Assault or domestic assault, MCL 750.81.
- ♦ Aggravated assault or aggravated domestic assault, MCL 750.81a.
- ♦ Entering without breaking, MCL 750.115.
- ♦ Fourth-degree child abuse, MCL 750.136b.
- ♦ Accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a.
- ♦ Vulnerable adult abuse, MCL 750.145n.
- ♦ Solicitation to commit a felony, MCL 750.157b(3)(b).
- ♦ Impersonating a sheriff, conservation officer, coroner, constable, or police officer, MCL 750.215.
- ♦ Illegal sale of a firearm or ammunition, MCL 750.223.
- ♦ Illegal sale of a self-defense spray, MCL 750.224d.
- ♦ Sale or possession of a switchblade, MCL 750.226a.
- ♦ Improper transportation of a firearm, MCL 750.227c.
- ♦ Failure to have a pistol inspected, MCL 750.228.
- ♦ Accepting a pistol in pawn, MCL 750.229.
- ♦ Failure to register the purchase of a firearm or a firearm component, MCL 750.232.
- ♦ Improperly obtaining a pistol, making a false statement on an application to purchase a pistol, or using false identification to purchase a pistol, MCL 750.232a.
- ♦ Intentionally aiming a firearm without malice, MCL 750.233.
- ♦ Intentionally discharging a firearm aimed without malice, MCL 750.234.
- ♦ Possessing a firearm on prohibited premises, MCL 750.234d.
- ♦ Brandishing a firearm in public, MCL 750.234e.
- ♦ Possession of a firearm by an individual less than 18 years of age, MCL 750.234f.

- ♦ Intentionally discharging a firearm aimed without malice causing injury, MCL 750.235.
- ♦ Parent of a minor who possessed a firearm in a weapon free school zone, MCL 750.235a.
- ♦ Setting a spring gun or other device, MCL 750.236.
- ♦ Possessing a firearm while under the influence of intoxicating liquor or a drug, MCL 750.237.
- ♦ Weapon free school zone violation, MCL 750.237a.
- ♦ Indecent exposure, MCL 750.335a.
- ♦ Stalking, MCL 750.411h.
- ♦ Reckless, careless, or negligent use of a firearm resulting in injury or death, MCL 752.861.
- ♦ Careless, reckless, or negligent use of a firearm resulting in property damage, MCL 752.862.
- ♦ Reckless discharge of a firearm, MCL 752.863a.
- ♦ A violation of a law of the United States, another state, or a local unit of government of this state or another state substantially corresponding to a violation described above.

MCL 28.425b(17)(a) defines “conviction” as “a final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the juvenile division of probate court or family division of circuit court for a violation that if committed by an adult would be a crime.”

*For information on MCL 333.7411, see *Managing A Trial Under the Controlled Substances Act* (MJI, 1995), Section 15.7.

MCL 333.7411 provides that when a person who has not previously been convicted of a controlled substance offense, or who has one prior conviction for possession of an imitation controlled substance, pleads guilty to or is convicted of an enumerated controlled substance offense, the trial court may defer further proceedings and place that individual on probation.* If the individual fulfills the terms of probation, the court must discharge the individual and dismiss the proceedings. In *Carr v Midland County Concealed Weapons Licensing Board*, 259 Mich App 428, 439 (2003), the Court held that once an individual has been successfully discharged from a drug charge pursuant to MCL 333.7411, that individual has not been convicted for the purposes of the Concealed Pistol Licensing Act.

MCL 28.425b(17)(d) defines “misdemeanor” as “a violation of a penal law of this state or violation of a local ordinance substantially corresponding to a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine, or both.” It is not clear whether a criminal contempt conviction for a PPO violation is encompassed by this provision. See Section 8.9(A) for a general discussion of whether criminal contempt constitutes a “misdemeanor.”

Upon entry of a conviction of a misdemeanor resulting in a prohibition against using, transporting, selling, purchasing, carrying, shipping, receiving or

distributing a firearm under MCL 28.425b, the Department of State Police shall immediately enter the conviction into the LEIN. MCL 28.425b(8).

See Section 9.4(B) regarding license suspension and revocation for concealed pistol license holders who are charged with a misdemeanor.

Pursuant to MCL 28.432a, the requirements for obtaining a license to carry a concealed pistol do not apply to any of the following:

“(a) A peace officer of a duly authorized police agency of the United States or of this state or a political subdivision of this state, who is regularly employed and paid by the United States or this state or a subdivision of this state, except a township constable.

“(b) A constable who is trained and certified under . . . MCL 28.601 to 28.616, while engaged in his or her official duties or going to or coming from his or her official duties, and who is regularly employed and paid by a political subdivision of this state.*

“(c) A person regularly employed by the department of corrections and authorized in writing by the director of the department of corrections to carry a concealed pistol during the performance of his or her duties or while going to or returning from his or her duties.

“(d) A member of the United States army, air force, navy, or marine corps while carrying a concealed pistol in the line of duty.

“(e) A member of the national guard, armed forces reserves, or other duly authorized military organization while on duty or drill or while going to or returning from his or her place of assembly or practice or while carrying a concealed pistol for purposes of that military organization.

“(f) A resident of another state who is licensed by that state to carry a concealed pistol.

“(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms.

“(h) A person while carrying a pistol unloaded in a wrapper or container in the trunk of his or her vehicle or, if the vehicle does not have a trunk, from transporting that pistol unloaded in a locked compartment or container that is separated from the ammunition for that pistol from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business, or in moving goods from 1 place of abode or business to another place of abode or business.

*The concealed pistol statute is applicable to township constables.

“(i) A peace officer or law enforcement officer from Canada.”

9.7 Restrictions Arising from Entry of a Court Order

A personal protection order, pretrial conditional release order, or probation order may by its terms prohibit an individual from purchasing or possessing a firearm or ammunition. In addition to such court-ordered prohibitions, certain statutory restrictions arise from the entry of such orders. If a PPO, conditional release order, or probation order restrains an individual from abusing his or her intimate partner, a federal statute prohibits the individual from purchasing or possessing firearms or ammunition, even if the court order is silent on this issue. Under Michigan law, PPOs and conditional release orders protecting a named person give rise to licensing restrictions.

Note: The discussion in this section does not apply to government employees who must carry a firearm as a condition of employment, such as law enforcement or corrections officers. Court orders restraining these individuals from purchasing or possessing firearms are the subject of Section 9.8.

A. Federal Restrictions on Purchase or Possession of Firearms or Ammunition After Entry of a Court Order

Under 18 USC 922(g)(8), persons who are subject to court orders restraining them from abusing an intimate partner may not purchase or possess firearms or ammunition. The statute provides:

“It shall be unlawful for any person--

. . .

“(8) who is subject to a court order that —

“(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;*

“(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

*For a case where the defendant agreed to an order but no hearing was held, see *United States v Spruill*, 292 F3d 207 (CA 5, 2002).

“(C)

“(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

“(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .

“to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

The penalty for violating this statute is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).

18 USC 921(a)(32) defines “intimate partner” as follows:

“The term ‘intimate partner’ means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.”

18 USC 922(g)(8) has been subject to constitutional challenge on various grounds. The following cases illustrate:

- ♦ *United States v Napier*, 233 F3d 394 (CA 6, 2000) (Rejected due process challenges to the statute based on assertions that it does not require notice of its prohibitions. This case also rejected challenges based on the Commerce Clause and the Second Amendment).
- ♦ *United States v Kafka*, 222 F3d 1129 (CA 9, 2000) (Conviction under the statute did not violate due process rights, even though the defendant did not know that his possession of a firearm violated the statute).
- ♦ *United States v Baker*, 197 F3d 211 (CA 6, 1999) (Rejected assertions that the statute violates the Commerce Clause and the equal protection guarantees of the Fifth Amendment. This case also held that the statute does not violate due process because it lacks a requirement that a defendant receive direct notice of the statutory firearms disability after issuance of the protection order. Finally, the case held that prosecution under the statute does not constitute cruel and unusual punishment under the Eighth Amendment).
- ♦ *United States v Emerson*, 270 F3d 203 (CA 5, 2001) (Rejecting arguments that the statute violates the Second Amendment and the Fifth Amendment’s due process guarantees. The court found that defendant needed the knowledge that he possessed the weapon in order to violate the statute, but that he did not need to know that the possession violated federal law. *Id.* at 215-216.).

Michigan PPOs and conditional pretrial release orders for protection of a named person under MCL 765.6b are likely to meet the criteria set forth in 18 USC 922(g)(8). The federal statute may also apply to probation orders issued under MCL 771.3(2)(o), which authorizes the issuance of probation orders with “conditions reasonably necessary for the protection of 1 or more named persons.” For discussion of the standard for issuing a domestic relationship PPO, see Section 6.3(C). For discussion of conditional release orders issued for protection of a named individual in a criminal proceeding, see Sections 4.4 and 4.6. Probation orders are discussed in Section 4.14(B).

Under the Michigan statutes governing PPOs, conditional release orders, and probation orders, a court has broad discretion with respect to firearms. A court may or may not impose firearms restrictions as it sees fit, or it may tailor firearms restrictions to specific circumstances. For example, a court might prohibit an individual from possessing a pistol in his or her residence but still permit the individual to possess a hunting rifle at another separate location. It is not clear whether a Michigan order that allows access to firearms under its own terms would nonetheless result in a prohibition against the purchase or possession of all firearms under 18 USC 922(g)(8). On its face, the federal statute forbids the purchase or possession of firearms or ammunition in interstate or foreign commerce by persons “who are subject to a court order,” without any deference to the court order’s provisions in this regard. See *New Jersey v S.A.*, 675 A2d 678 (NJ Super, 1996), holding that 18 USC 922(g)(8) prohibited return of confiscated firearms to a person subject to a state domestic violence restraining order. Among the issues to consider in resolving this question are: 1) whether the court order was issued after a hearing, and whether the restrained party had notice and an opportunity to participate as provided in 18 USC 922(g)(8)(A); 2) whether the purchase or possession of firearms or ammunition is “in interstate or foreign commerce”; and, if so, 3) whether the federal statute is preemptive of state law that would permit possession of a firearm under certain circumstances. Federal preemption questions are governed by 18 USC 927, which is quoted at Section 9.3.

Relief from disabilities imposed under 18 USC 922(g)(8) is available upon application to the U.S. Attorney General. The U.S. Attorney General may grant relief “if it is established to his satisfaction that the circumstances regarding the disability, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.” 18 USC 925(c).

In addition to the forgoing restrictions, federal law forbids the sale or other disposal of firearms or ammunition to a person with knowledge or reasonable cause to believe that the person is subject to a court order restraining the person from abusing his or her intimate partner. See 18 USC 922(d)(8) and 18 USC 924(a)(2)(imposing a fine and/or a maximum ten-year prison term for violation of this prohibition).

B. Michigan Licensing Restrictions After Entry of a Court Order

The issuance of a Michigan personal protection order or an order for conditional pretrial release under MCL 765.6b can result in restrictions on obtaining a license to purchase, carry, or transport a pistol (a “pistol license”), and to carry a concealed pistol (a “concealed pistol license”). These state restrictions do not apply to long guns.

1. Restrictions on Obtaining a License to Purchase, Carry, or Transport a Pistol

Under MCL 28.422(3)(a), the following persons are disqualified from obtaining a license to purchase, carry, or transport a pistol:

- ♦ Persons subject to domestic relationship or non-domestic stalking PPOs issued under MCL 600.2950 and MCL 600.2950a. This restriction applies regardless of whether the parties to the PPO are involved in an intimate relationship. MCL 28.422(3)(a)(iii) and (iv).
- ♦ Persons subject to conditional pretrial release orders issued for the protection of a named person under MCL 765.6b, *if* the order specifies that the defendant may not purchase or possess a firearm. MCL 28.422(3)(a)(vi).

Note: For purposes of pistol licensing, MCL 28.422(3)(a) appears to make a distinction between PPOs and conditional release orders. The express language of the pistol licensing statute provides for a disability after issuance of a PPO without regard to whether the PPO explicitly addresses firearms. A conditional pretrial release order, on the other hand, must specifically prohibit access to firearms before the licensing disability applies.*

The foregoing orders will not result in the inability to obtain a pistol license unless the restrained individual received notice and an opportunity for a hearing in the court proceeding in which the PPO or conditional release order was issued. MCL 28.422(3)(a). Moreover, the pistol license disability will not apply unless the PPO or conditional release order was entered into the LEIN network. MCL 28.422(3)(a). Accordingly, LEIN entry of an ex parte PPO entered without notice to the respondent will not result in a pistol license disability until the respondent has received notice and an opportunity for a hearing.*

Purchasing, possessing, or transporting a pistol without a license is a misdemeanor punishable by 90 days in jail and/or a maximum \$100.00 fine. MCL 750.232a.

*See Sections 4.6(A), 6.3(B), and 6.4(C) on court orders with firearms restrictions.

*Compare the concealed pistol licensing restrictions below, which apply even if the restrained party had no notice in the proceeding where the order issued.

2. Restrictions on Obtaining a License to Carry a Concealed Pistol

Under MCL 28.425b(7)(d), the following persons are disqualified from receiving a license to carry a concealed pistol:

- ♦ Persons subject to domestic relationship and non-domestic stalking PPOs issued under MCL 600.2950 and MCL 600.2950a. This restriction applies regardless of whether the parties to the PPO are involved in an intimate relationship. MCL 28.425b(7)(d)(iii).
- ♦ Persons subject to conditional pretrial release orders issued under MCL 765.6b, *if* the order specifies that the defendant may not purchase or possess a firearm. MCL 28.425b(7)(d)(iv).

Note: MCL 28.425b(7)(d) appears to make a distinction between PPOs and conditional release orders. The express language of the statute provides for a disability after issuance of a PPO without regard to whether the PPO explicitly addresses firearms. A conditional pretrial release order, on the other hand, must specifically prohibit access to firearms before the licensing disability applies.*

*See Sections 4.6(A), 6.3(B), and 6.4(C) on court orders with firearms restrictions.

*Compare the pistol licensing restrictions, which apply only if there was notice and opportunity to be heard when the order issued.

The concealed pistol restrictions in MCL 28.425b(7)(d) take effect without regard to whether the person subject to the order received notice and an opportunity to be heard in the proceeding at which the order issued. Thus, an ex parte PPO issued without notice to the respondent can result in a concealed pistol disability.*

Carrying a concealed pistol without a license is a felony punishable by up to five years in prison and/or a maximum \$2,500.00 fine. MCL 750.227(3).

3. LEIN Entry; Notice Requirements for Persons Subject to Disqualifying Court Orders

Upon entry of a court order resulting in a prohibition against using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm under MCL 28.425b, the Department of State Police shall immediately enter the order into LEIN. MCL 28.425b(8).

Persons who are subject to a court order that disqualifies them from obtaining a pistol license must receive notice of their disqualification from the Department of State Police upon entry of the order into the LEIN network. MCL 28.422b(1). The notice shall be sent by first class mail to the last known address of the person, and shall include at least all of the following:

- ♦ The name of the person disqualified.
- ♦ The date of the disqualifying order's entry into LEIN.
- ♦ A statement that the person cannot obtain a license to purchase a pistol or obtain a concealed pistol license until the order or disposition is removed from the LEIN network.

- ♦ A statement that the person may request the State Police to correct or expunge* inaccurate information from the LEIN network. MCL 28.422b(1)(a)–(d).

*Proceedings for correction or expungement are set forth in MCL 28.422b(2)–(5).

9.8 Court Orders Prohibiting Law Enforcement Officers from Purchasing or Possessing Firearms

The effect of a PPO or conditional release order on a law enforcement officer's ability to possess a firearm will depend upon whether the order specifically addresses this issue:

- ♦ **If the order specifically prohibits the officer from possessing a firearm, the officer is bound by its provisions.**

The statutes governing PPOs and conditional release orders specifically state that a court may prohibit the restrained party from purchasing or possessing firearms or ammunition. These statutes contain no exemptions for law enforcement officers in this regard. See MCL 600.2950(1)(e), MCL 600.2950a(23), and MCL 765.6b(3). Although the statute governing conditions in probation orders does not specifically reference firearms restrictions, MCL 771.3(4) provides that “[t]he court may impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper.” Such conditions could include firearms restrictions; as is the case with PPOs and pretrial release orders, the probation statute provides no exemption from firearms restrictions for law enforcement officers.

Accordingly, courts have discretion under the PPO, conditional release, and probation statutes to restrict an officer's access to all firearms, under all circumstances, or to impose tailored restrictions (e.g., the officer may only possess a firearm while on duty in his or her jurisdiction). The officer must abide by whatever restrictions the court imposes.

Although a law enforcement officer may be prohibited from possessing a firearm by court order, relief from the court's restrictions is available. Relief from a PPO may be sought by filing a motion to modify or rescind it within 14 days of service. This motion must be heard within five days of filing the motion. MCL 600.2950(14) and MCL 600.2950a(11). Relief from a conditional release order may be sought by a motion to modify it under MCR 6.106(H)(2) (felony cases) or MCL 780.65(1) (misdemeanor cases). See Section 6.7 on motions to modify a PPO, and Section 4.9 on modification of a conditional release order.

*See Section 9.7 for discussion of these restrictions.

- ♦ **If a PPO or conditional release order restraining a law enforcement officer does not address the purchase or possession of firearms, the officer will be permitted to carry a firearm in the line of duty.**

Law enforcement officers acting in the line of duty are exempt from both federal and Michigan firearms restrictions imposed after entry of a court order. Thus, where the court's order is silent regarding firearms, no statutory disabilities apply with respect to service weapons. With respect to other weapons, however, the restrictions imposed on the general public apply.*

The exemption from the federal restrictions imposed by 18 USC 922(g)(8) provides:

“The provisions of this chapter [18 USC 921 et seq.], . . . shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.”
18 USC 925(a)(1).

For the exemptions from the Michigan pistol and concealed pistol licensing requirements, see MCL 28.432 and MCL 28.432a. These statutes provide exemptions for employees of police, corrections, or military agencies, with respect to weapons used for the purposes of the agency.

9.9 Michigan Restrictions on Concealed Weapons Applicable to Dangerous Individuals

The Michigan pistol licensing and concealed pistol licensing statutes each contain provisions that permit disqualification from licensure for individuals who are deemed dangerous to themselves or others.

The pistol licensing statute, MCL 28.422(3), provides in pertinent part:

“The commissioner or chief of police of a city, township, or village police department that issues licenses to purchase, carry, or transport pistols, or his or her duly authorized deputy, or the sheriff or his or her duly authorized deputy, in the parts of a county not included within a city, township, or village having an organized police department, in discharging the duty to issue licenses shall with due speed and diligence issue licenses to purchase, carry, or transport pistols to qualified applicants residing within the city, village, township, or county, as applicable *unless he or she has probable cause to believe that the applicant would be a threat to himself or herself or to other individuals, or would commit an*

offense with the pistol that would violate a law of this or another state or of the United States. An applicant is qualified if all of [the circumstances listed in the statute] exist.” [Emphasis added.]

The Michigan appellate courts have not decided whether this section’s “probable cause” requirement is in addition to the qualifying circumstances listed in the statute, or whether the qualifying circumstances serve as an exclusive list of factors to consider in determining whether an applicant poses a threat.

MCL 28.425b(7)(n) provides for disqualification of an applicant for a concealed pistol license if it is determined that issuing the license is “detrimental to the safety of the applicant or to any other individual.” A determination under this provision shall be based on “clear and convincing evidence of repeated violations of this act, crimes, personal protection orders or injunctions, or police reports or other clear and convincing evidence of the actions of, or statements of, the applicant that bear directly on the applicant’s ability to carry a concealed pistol.” *Id.*

Suspension of a concealed pistol license is also possible in appropriate circumstances. MCL 28.428(4) provides:

“If the concealed weapon licensing board determines by clear and convincing evidence based on specific articulable facts that the applicant poses a danger to the applicant or to any other person, the concealed weapon licensing board shall immediately suspend the individual’s license pending a revocation hearing under this section. The concealed weapon licensing board shall send notice of the suspension to the individual’s last known address as indicated in the records of the concealed weapon licensing board. The notice shall inform the individual that he or she is entitled to a prompt hearing on the suspension, and the concealed weapon licensing board shall conduct a prompt hearing if requested in writing by the individual.”

9.10 Seizure and Forfeiture of Firearms Under Michigan Law

Firearms involved in violations of the Michigan statutes discussed in this section may be seized and forfeited to the state. Regarding seizure of weapons after violation of the pistol or concealed pistol licensing statutes, MCL 28.433 provides:

“When complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases that any pistol or other weapon or device mentioned in this act [MCL 28.421 et seq.] is unlawfully possessed or carried by any person, such magistrate shall, if he be satisfied that there is reasonable cause to believe the

matters in said complaint be true, issue his warrant directed to any peace officer, commanding him to search the person or place described in such complaint, and if such pistol, weapon or device be there found, to seize and hold the same as evidence of a violation of this act [MCL 28.421 et seq.].”

MCL 750.238 contains a substantially similar provision addressing violations of the restrictions on the purchase or possession of firearms by convicted felons found in MCL 750.224f.

With regard to forfeiture of weapons after violation of the pistol or concealed pistol licensing statutes, see MCL 28.425g, which provides:

“A pistol carried in violation of this act [MCL 28.421 et seq.] is subject to seizure and forfeiture in the same manner that property is subject to seizure and forfeiture under . . . MCL 600.4701 to 600.4709.”

See also MCL 28.434(1), providing that:

“. . . all pistols, weapons or devices carried or possessed contrary to this act [MCL 28.421 et seq.] are declared forfeited to the state, and shall be turned over to the director of the department of state police or his or her designated representative, for disposal under this section.”

Provisions for disposal (including notice requirements) are found at MCL 28.434(2)–(3).

MCL 750.239 contains a similar provision addressing violations of the restrictions on the purchase or possession of firearms by convicted felons found in MCL 750.224f.

Note: Firearms used in violation of 19 USC 921 et seq. are subject to seizure and forfeiture under 18 USC 924(d).

*Law enforcement officers acting in the line of duty are exempt from the restrictions on this chart, except where otherwise indicated.

9.11 Chart: Summary of Federal and Michigan Statutory Firearms Restrictions*

| Event triggering restriction | Federal restrictions | Michigan restrictions |
|---------------------------------|---|---|
| Felony indictment (Section 9.4) | Person indicted is not disqualified from purchasing or possessing firearms or ammunition, but it is illegal to sell these items to person indicted. | 1. Disqualified from obtaining pistol license. 2. Disqualified from obtaining concealed pistol license. Existing C.P. license subject to suspension. |

| Event triggering restriction | Federal restrictions | Michigan restrictions |
|---|--|---|
| Misdemeanor indictment (Section 9.4) | No federal restrictions. | Existing concealed pistol license subject to suspension. (Note: Applicability of restriction to person charged with criminal contempt is unclear.) |
| Felony conviction (Section 9.5) (Note: For purposes of the federal statutes, a conviction that was expunged or set aside, or for which a person has had civil rights restored shall not be considered a conviction unless it expressly provides for a firearms restriction.) | Person convicted may not purchase or possess firearms or ammunition. | 1. If convicted of felony offense punishable by 4 or more years imprisonment, disqualified from purchasing or possessing firearms until statutory conditions met and disqualification period expires. (No exemption for law enforcement officer.) 2. If subject to above restrictions on purchasing or possessing, may not obtain pistol license. 3. May not obtain concealed pistol license; existing license subject to suspension, revocation. |
| Misdemeanor conviction (Section 9.6) (Note: For purposes of the federal statutes, a conviction that was expunged or set aside, or for which a person has had civil rights restored shall not be considered a conviction unless it expressly provides for a firearms restriction.) | If domestic violence misdemeanor, person convicted may not purchase or possess firearms or ammunition. (No exemption for law enforcement officer.) | Existing concealed pistol license subject to suspension, revocation. May not obtain a new c.p. license if specified conviction within 3 years of application, or if specified conviction within 8 years of application. (Note: Applicability of restriction to criminal contempt conviction is unclear.) |
| Entry of court order against person other than law enforcement officer (PPO or conditional release order for protection of named person under MCL 765.6b) (Section 9.7) Law enforcement officer is exempt from both Michigan and federal restrictions, but bound by any specific firearms restrictions imposed in the court's order (Section 9.8) | Person subject to the order may not purchase or possess firearms or ammunition. | 1. Disqualified from obtaining pistol license if order is issued after notice to restrained party and entered into LEIN. A conditional release order must also specify a firearms limitation for disqualification to apply. 2. Disqualified from obtaining concealed pistol license. A conditional release order must also specify a firearms limitation for disqualification to apply. |

| Event triggering restriction | Federal restrictions | Michigan restrictions |
|--|-----------------------|---|
| Dangerous Individuals (Section 9.9) | No federal provision. | Possible disqualification from obtaining pistol license. Disqualification from obtaining concealed pistol license. C.P. license may be suspended or revoked. |